# No. 22,320

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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ROY PEMBERTON,

*Appellant,*

vs.

JAMES A. DAVIS,

*Appellee.*

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## APPELLEE'S ANSWERING BRIEF

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### JURISDICTION

Appellee agrees with Appellant's statement of jurisdiction.

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### STATEMENT OF THE CASE

Appellee also agrees with Appellant's statement of the facts, except that the Court should also know that when the aircraft in question was sold, it was sold by order of the District Court which order directed that Appellant's lien, if any, attach to the proceeds of the sale with the amount of the lien to be determined at a later date (Tr. of Rec. 11, L 9). After the aircraft was sold a hearing was held before the Referee in Bankruptcy to determine the amount of Appellant's

lien following which the Referee allowed the repair lien of $272.04 and a storage lien of $250.00 (Tr. of Rec. 22, L 25). Appellant took the matter to the District Court seeking an increase in the amount of the storage lien, but instead of granting an increase, the District Court eliminated the lien of $250.00 allowed for storage, leaving Appellant with $272.04 for the repair lien (Tr. of Rec. 38, L 9).

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## ARGUMENT

### I

### A PARTY STORING AN AIRCRAFT FOR AN ATTACHING OFFICER DOES NOT HAVE A LIEN UPON THE ATTACHED AIRPLANE FOR STORAGE CHARGES

Appellant is not entitled to a lien on the airplane for storing it for the Sheriff. Even if such a lien were found to exist in this case, it could not be for more than $250.00 since Appellant did not give the legal owner notice of the storage and obtain a written consent from the owner as required by C.C.P. Section 1208.62.

> "Amount of lien; notice to and consent of legal owner and mortgagee. That portion of such lien in excess of two hundred fifty dollars ($250) for work or services rendered or performed at the request of any person other than the holder of the legal title is invalid, unless prior to commencing such work or service the person claiming the lien gives actual notice to the legal owner and the mortgagee, if any, of the aircraft, and the written consent of the legal owner and the mortgagee of the aircraft is obtained before such work

> or services are performed. For the purposes of this chapter the person named in the federal aircraft registration certificate issued by the Administrator of Civil Aeronautics shall be deemed to be the legal owner."

For further discussion of this point see the Referee's opinion herein commencing at page 20 of the Record. The District Court agreed that at most the storage lien could be $250.00.

> "If a sheriff holding property under attachment can subject that property to an encumbrance for the benefit of a third person, we have no difficulty in agreeing with the Referee that section 1208.62 is applicable to a bailment for safekeeping or storage, as being one for 'services' within the meaning of the statute. Cf. *People v. McCord,* 59 P. 2d 587. If Pemberton has any storage lien at all, it is limited to $250." Tr. of Rec. 31, L 18 to 32, L 1.

Appellant has not argued the application of C.C.P. Section 1208.62 and totally ignores it in attempting to recover for the storage. There is, and can be, absolutely no evidence that the written consent of the owner was given to the storage of the airplane. The storage lien cannot exceed $250.00.

The real question is whether a lien for $250.00 for storage can be allowed. Appellee can do no better in briefing this point than the quote from the excellent opinion of the District Court:

> "For us, the more difficult concept is the holding by the Referee that a sheriff or constable who obtains possession of personal property of an-

other by levy of a writ of attachment has the power to subject that property to an encumbrance which is enforceable against the true owner by a third person. If this is the law, the hazards are obvious and are dramatically illustrated by the facts of this case. Here attached property, which was ultimately sold for $5,010, is claimed to be subject to a storage lien in the amount of approximately two-fifths of its value, enforceable for the benefit of a person with whom the sheriff dealt while holding the property under attachment and continuing in effect after the attachment was unconditionally released. It is also noted that while holding the aircraft for the Sheriff, storage was billed at $5 per day, but in Court, Pemberton claimed and proved only $3.50 per day as the reasonable value of the services.

If the limited right to possession acquired by a Sheriff under a writ of attachment empowers him, by his voluntary act, to subject the property to statutory liens for storage, repairs and services rendered with respect to the property, we see no reason why he could not execute a chattel mortgage on the property as security for the cost of such work or services; yet, we have no doubt such action would be held to be a wrongful conversion of the property by the Sheriff.

There is an astonishing dearth of precedent on the precise point with which we are concerned. 6 Am. Jur. 2d 922, § 509; 95 A.L.R. 1529. Pemberton claims that the right to a storage lien on bailment by an attaching sheriff has been settled in California, the controlling law here, and cites *Bentinck v. Menotti,* 275 P. 850, and *Newell v. McDonald,* 212 P. 389. Our review of these and other California authorities does not persuade us

that this is so. The relationships created by the Sheriff's possession of property under attachment have been variously characterized. California Courts have said that the sheriff is the agent of the attaching creditor and not of the Court, and have pointed out that the attachment may be dissolved or released by ex parte direction of the attaching creditor without court intervention. In *United States Overseas Airlines v. County of Alameda,* 45 Cal. Rptr. 337, the Court reviewed California authority and said:

> 'Not not was the airplane not "in litigation" but it was also not in the possession of any of the depositaries listed in section 983. The sheriff is not among those designated by the statute nor does the sheriff's levy bringing the property within the "possession" of the court. The issuance of the writ by the clerk and its levy by the sheriff are ministerial acts, not judicial proceedings (Wheeler v. Farmer, 38 Cal. 203, 216; Hayward Lumber & Inv. Co. v. Biscailuz, 47 Cal. 2d 716, 721, 306 P. 2d 6). A sheriff serving a writ of attachment is an officer of the court (Sparks v. Buckner, 14 Cal. App. 2d 213, 220, 57 P. 2d 1395) but is not its agent. He is the agent of the attaching creditor and the attached property in the custody of the sheriff is constructively in the possession of the attaching creditor (McCaffey C. Co. Inc. v. Bank of America, 109 Cal. App. 415, 423, 294 P. 45). The levying officer acquires only a special lien dependent on possession which authorizes him to hold the property (Civ. Code, § 3057; Code Civ. Proc. § 542) for the benefit of the attaching creditor (United States v. Fisher, D.C., 93 F. Supp. 73, 75). An attachment does not affect

> the general title of the owner of property who retains the power to sell or assign subject to the attachment (6 Am. Jur. 2d, Attachment and Garnishment, § 459, p. 881; § 503, p. 918).'

See also: *Perrin v. McMann,* 31 P. 837. It has also been held that the keeper designated by the Sheriff is the agent of the Sheriff for whose wrongful use or disposition of the attached property the Sheriff is liable. *Aigeltinger v. Whelan,* 65 P. 125; *Newell v. McDonald,* 212 P. 389; *Reynolds v. Lerman,* 292 P. 2d 559.

It should also be observed that the sheriff himself is given a statutory possessory lien (C.C. § 3057) which secures payment to him of the costs and expenses of safely keeping the property. *Perrin v. McMann,* 31 P. 837; *Newell v. McDonald,* 212 P. 389; *United States v. Fisher,* D.C. Cal. 1948, 93 F. Supp. 73; *Allen v. Clark,* S.D. Cal. 1938, 22 F. Supp. 898.

While the sheriff has a statutory lien on attached property to secure payment of his fees and costs, the plaintiff attaching creditor is primarily liable therefor and the California statutory scheme contemplates that the sheriff should keep such payments current by requiring advance deposits from and making re-current demands upon the attaching creditor [C.C.P. §542(5)]. In *Allen v. Clark,* supra, Judge Yankwich wrote:

> 'The law governing the rights of sheriffs applies to the marshal in this district, both under the Conformity Act, 28 U.S.C.A. § 726 and our local rule 57. An attaching officer, before levy, may demand a deposit of sufficient money to take and keep personal property for five days.

> From time to time, he may make further demands for deposits for five-day periods. If this money is not paid, he may release the property *"to the person or persons from whom the same was taken."* And "There shall be *no liability* upon the part of the sheriff, constable or marshal to take or hold personal property unless the provisions of this section shall have been fully complied with." Code Civ. Proc. § 542, subd. 5, as amended by St. Cal. 1937, p. 1617. (Italics added.)
>
> 'The California Civil Code gives the attaching officer a lien on the property. Civ. Code Cal., § 3057. In applying the section, courts have held that it justified the officer's or his agent's refusal to release the attachment unless the fees are paid. Perrin v. McMann, 1892, 97 Cal. 52, 31 P. 837; Robinett v. Connolly, 1888, 76 Cal. 56, 18 P. 130; Bentinck v. Menotti, 1929, 97 Cal. App. 412, 275 P. 850.'

We have found no case discussing the problem arising where a sheriff negligently fails to require payments from the attaching creditor and permits a large account to accrue for the safekeeping of the property. The extent of the sheriff's lien may be limited or affected by such neglect to perform his official duties.

The California courts have also definitively concluded that if an attaching sheriff does bail the attached goods to a warehouseman and the latter sells the property in enforcement of his presumed warehouseman's lien, he is acting as the agent of the sheriff and the sheriff, as principal, is liable for conversion for the unauthorized sale. *Reynolds v. Lerman,* 1956, 292 P. 2d 559; *Aigeltinger*

*v. Whelan,* 1901, 65 P. 125. It occurs to us that a ruling that a sheriff is guilty of conversion of attached goods sold by his agent, the warehouseman, in enforcement of a statutory storage lien, is inconsistent with the thought that the limited possessory right acquired by a sheriff by levy of attachment gives him power to impose a lien on the property for the benefit of a third person.

It is the general rule that the lien of a bailee of a chattel arises only where his employment is by the owner or by one acting with the owner's consent, express or implied. 8 Am. Jur. 2d, § 269, p. 1156; 48 A.L.R. 2d 907. So California has held that no lien for storage is acquired on bailment by a thief, *General Exchange Ins. Corp. v. Pellissier Square Garage,* 1937, 69 P. 2d 237, and in other cases, the limited authority of the bailor has been relied upon to prevent the attachment of a statutory lien to bailed property. *Lowe v. Woods,* 1893, 34 P. 959; *McTigue v. Arctic Ice Cream Supply Co.,* 1913, 130 P. 165. These rules may, of course, be changed by statute (Cf. *Davenport v. Grundy Motor Sales Co.,* 1915, 152 P. 932), but we find no language in the aircraft lien law which would warrant implication of a change from settled general principles and conclude, for example, that no lien against the aircraft for work ordered by a thief would be enforceable against the true owner.

It is possible to read, as does Pemberton, the cases of *Bentinck v. Menotti* and *Newell v. McDonald,* supra, as authorizing an enforceable storage lien against a bailment of goods by an attaching sheriff. In both the cited cases, however, the sheriff or constable himself refused to release the

property except on payment of the storage fees and was, in truth, enforcing his own statutory lien and not that of the warehouseman. See *Allen v. Clark,* supra. The Court, in the *Newell* case, in fact characterized the ex parte refusal of the garageman to release the property on order of the sheriff as possible 'insubordinate conduct' of an agent toward his principal.

The distinction between the lien of the sheriff and the lien claimed by the sheriff's bailee may, on casual reflection, appear to be a distinction without a practical difference; but it does have the plain advantage of recognizing the inability of the sheriff to encumber property held under attachment and will permit judicial control of the scope of the sheriff's lien where he has failed and neglected to obtain payment of or security for keeper's costs from his principal, the attaching creditor, in the manner contemplated by C.C.P., § 542(5). 'The bailee is generally held to have no lien on property for his storage charges as against the true owner where it is left with him by public officers after seizing it from such owner, either for some alleged violation of law or upon an attachment, at least in cases where the proceedings against the owner have terminated without the entry of any judgment against the property.' 8 Am. Jur. 2d, p. 1157, Sec. 270. On January 21, 1965, the Sheriff of Kern County unconditionally released the attachment on the subject aircraft. His official lien depended on possession (C.C. § 3057) and was released when he abandoned possession and control. Pemberton had no statutory storage lien while he had custody of the aircraft as agent of the Sheriff. The pro-

> ceedings before this Court, which resulted in the sale of the aircraft, showed that between January 21, 1965 and the date of sale, Pemberton had a valid lien for repairs in the amount of $272.04 which was never contested by anyone, but also asserted a non-existent lien for storage approximating $2,000, payment of which was a condition to release of the property. Pemberton cannot claim a storage lien for any of the period of his possession of the aircraft during which he refused to release possession unless an invalid lien claim should be paid. Pemberton must be remitted to his remedies against the sheriff of Kern County." Tr. of Rec. 32, L 2 to 38, L 7.

Should this Court not agree with the District Court, the most that can be allowed for the storage lien is $250 as earlier discussed.

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## II

### EFFECT OF SEC. 2892 OF THE CALIFORNIA CIVIL CODE

Appellant attempts to avoid the force of C.C. 2892 which prohibits a storage lien accruing when property is held under a repair lien by arguing that Appellant was holding the property for the Sheriff, not because any repair lien was claimed. This is just contrary to the facts. Appellant has always claimed a repair lien.

Appellant's claim filed in the bankruptcy asserts the repair bill is a secured claim (Tr. of Rec. 13).

The very hearing before the Referee which resulted in this appeal was to determine the amount of Appellant's repair lien (Tr. of Rec. 18, L 7).

Appellant has accepted, by not appealing, the order of the Referee allowing $272.04 for the repairs (Tr. of Rec. 22, L 25) which as observed by the District Court, was a finding that Appellant had a valid lien of $272.04 for the repairs.

> "On June 19, 1967, the Referee filed his Findings of Fact, Conclusions of Law, Opinion and Decision, in which he concluded that the lien of Pemberton Flying Service in the amount of $272.04 for repairs to the aircraft ordered by the owner prior to bankruptcy (which had not been contested by the Trustee) should be allowed . . ." Tr. of Rec. 29, L 14-19.

Appellant should not be allowed to accept a lien for repairs, which can only be based on Appellant's possession of the aircraft and yet attempt to say that Appellant wasn't holding possession for itself but only as an agent for the Sheriff. Appellant is attempting to arrange the facts to fit the law because Appellant now recognizes that he cannot hold possession of an aircraft under a repair lien and claim a storage lien for the period the aircraft is so held.

Appellant argued very differently before the Referee:

> "The Referee: Your contention of the law is that if a man has a $270 bill, he is entitled to hold the aircraft until he is paid that $270 and, in addition, he is entitled to add to his bill the storage charges until he is paid, as part of his lien?
>
> Mr. Bates: That is right, sir. California law gives the * * *". Tr. of Rec. 76, L 15-22.

This argument is an admission that Appellant was attempting to do that which C.C. Sec. 2892 prohibits; that Appellant was holding the aircraft under a claim of lien for repairs and at the same time attempting to assert a lien for storage while so holding the aircraft.

It may well be that Appellant was holding the aircraft for the Sheriff during the attachment period but Appellant cannot expect this Court to believe that he would have released the aircraft to the Sheriff, the Trustee in Bankruptcy or anyone else, without being paid his repair bill. The Trustee did not ask him to do so as it would have been a useless act.

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## III

### STORAGE PERIOD OF JANUARY 21, 1965 TO APRIL 19, 1965

Appellant argues that the aircraft was left with Appellant from the date the Sheriff released the attachment, January 21, 1965, to the date of the sale of the aircraft, April 19, 1965, "apparently because the Trustee in the debtor proceedings preferred to do so" (Appellant's Opening Brief, P 12).

This just is not so. The Record shows clearly what happened.

On the very day the Sheriff released the attachment, the Trustee in Reorganization filed his petition asking the Sheriff's liens and Appellant's liens be declared void (Tr. of Rec. 2). An Order to Show Cause was issued the same day (Tr. of Rec. 6), the hearing thereon was held March 3, 1965, and the District

Court's order thereon made March 15, 1965 (Tr. of Rec. 8). The order directed the property be appraised and sold at as early a date as possible (Tr. of Rec. 11, L 9). The sale was held and the aircraft taken from Appellant April 19, 1965, a little more than a month later.

Appellant failed to appear at the hearing on the Order to Show Cause as shown by a recital in the order (Tr. of Rec. 8, L 28). The Trustee's belief regarding Appellant's reasons for holding the aircraft are asserted in the Trustee's petition for the Order to Show Cause.

> ". . . that Petitioner is informed and believes that said flying service claims a lien thereon for repairs and storage thereof." Tr. of Rec. 3, L 8.

The Order to Show Cause also reflects that Appellant was holding possession because of a claim of lien for repairs and storage.

> ". . . that said flying service may have a lien on said aircraft for repairs and storage, the existence and amount of which will be determined at a later date." Tr. of Rec. 9, L 27.

It is too late, now, for Appellant to attempt to take the position that it was not holding the aircraft on a claim that it had a repair lien. Since Appellant did so hold the aircraft, he is limited to his repair lien and cannot have a storage lien because of C.C. 2892.

## CONCLUSION

Appellant is not entitled to a lien for storage during the time Appellant held the aircraft for the Sheriff. Appellant's claim is against the Sheriff, not the property.

Appellant is not entitled to a lien for storage during the time the aircraft was not under attachment, as well as for the time it was under attachment, as Appellant was holding the property under a repair lien and is prohibited by C.C. Sec. 2892 from claiming such a storage lien.

Dated, Reno, Nevada,
February 26, 1968.

Respectfully submitted,
STEWART & HORTON,
By RICHARD W. HORTON,
*Attorneys for Appellee.*

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD W. HORTON.